7-2009

Imbree v McNeilly: A View from Singapore

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Published in Singapore Journal of Legal Studies, [2009] pp 283-289.

IMBREE v. MCNEILLY: A VIEW FROM SINGAPORE

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I. INTRODUCTION

In *Imbree v. McNeilly*,[1] the High Court of Australia ruled that a learner driver is no longer to be held to the standard of a reasonable but unqualified (and inexperienced) driver in negligence claims. This overrules *Cook v. Cook*[2] in this aspect and necessitates changes in tort textbooks which have very often cited *Cook* in direct contrast with the English position as embodied in *Nettleship v. Weston*.[3] The contrast, which the textbooks have traditionally drawn, is used to illustrate the principle that the objective standard of care required by the law is one that relates to the type of activity in which the defendant is engaged, rather than the category of actor to which the defendant belongs.[4] Thus, whereas the English Court of Appeal in *Nettleship* regarded that driving a motor vehicle requires the driver to be adjudged by the standard of a competent driver, the High Court of Australia in *Cook* was prepared to look to the individual characteristics of the defendant as evincing a "special relationship" with the plaintiff, to which effect was given by lowering the standard of care. This distinction has now been erased in *Imbree*, which concerned a claim by a passenger against an inexperienced driver of his car for injuries suffered. *Imbree* is certainly an important decision whose significance will surely find resonance in varied areas of tort law in time to come. It is the modest aim of this case note to show that *Imbree*, while a decision on a narrow point, in fact hints at a larger difficulty in the ascertainment of the standard of care in individual cases. It is in this context that it will be suggested that, when the time comes for Singapore courts to consider the applicability of *Imbree*, this difficulty should be borne in mind.

II. THE FACTS IN *IMBREE*

The facts in *Imbree* cannot be described as anything short of tragic. Essentially, the appellant (who was the plaintiff at first instance), Paul Imbree, suffered serious

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1 [2008] HCA 40 [*Imbree*].

2 (1986) 162 C.L.R. 376 [*Cook*].

3 [1971] 2 Q.B. 691 [*Nettleship*].

4 See generally *Clerk and Lindsell on Torts* (Sweet & Maxwell: London, 2006) at 478-9.

personal injuries in a motor accident on an outback dirt road in the Northern Territory in Australia. The driver of the vehicle in which he was travelling lost control and the car overturned. Matters had reached such a tragic conclusion when the appellant allowed the first respondent (who was the first defendant at first instance), Jesse McNeilly, aged 16 at the time of the accident, to drive his four-wheel drive vehicle on a "very wide two lane dirt track with no significant corrugations".[5] Significantly, the appellant knew that first respondent did not have a learner's permit but had driven a four-wheel drive vehicle before. The appellant and his travelling party, including the first respondent, in fact tried to obtain a learner's permit for the first respondent earlier in the driving holiday, but failed to do so as the offices concerned were closed. The accident occurred when the first respondent tried to avoid debris on the road and lost control of the vehicle, which then overturned. The appellant was rendered a tetraplegic as a result. He sued the first respondent and the owner of the vehicle, the second respondent, for damages resulting from negligent driving.

At first instance in the Supreme Court of New South Wales, Studdert J. found in favour of the appellant, finding that first respondent had "behaved with carelessness over and above what could be attributed merely to inexperience" and awarded the appellant damages of more than A$9.5 million, although there was a deduction of 30% for contributory negligence.[6] On appeal by the respondents to the New South Wales Court of Appeal, the majority found in favour of the appellant and regarded the first respondent's actions as careless rather than just inexperienced.[7] However, the appellant's damages were reduced by two thirds for his contributory negligence. The court followed *Cook*, which they regarded as establishing that "actions which are fairly seen as the result of (a learner driver's) inexperience and lack of qualification rather than as having been caused by superimposed or independent carelessness did not, of themselves, constitute a breach of the duty of care" which the learner driver owed to a licensed driver who was supervising the learner. The difference in opinion between the majority and minority was attributable merely to the application of the law, not to its substance. The appellant obtained special leave to appeal to the High Court of Australia. The primary issue for the High Court of Australia to determine was whether the decision of *Cook* should be overturned and whether a driver such as the first respondent without a licence owes the same duty of care as a licensed driver. This, in turn, concerned the related issue of whether or not *Nettleship* should apply in place of *Cook*, to which this note now turns with comments (also) on the Singapore position.

III. *NETTLESHIP* IN AUSTRALIA AND SINGAPORE

A. *Australia*

While Heydon J. preferred not to express an opinion on the correctness of *Cook*, the other judges in *Imbree* all expressed some view on the matter. There were three principal judgments: one each from Glesson C.J. and Kirby J., and a joint judgment from Gummow, Hayne and Kiefel JJ. Crennan J. agreed with the judgments of

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5 *Supra* note 1 at para. 30.

6 *Imbree v. McNeilly* [2006] NSWSC 680.

7 *McNeilly v. Imbree* (2007) 47 MVR 536.

Glesson C.J. and Gummow, Hayne and Kiefel JJ. In essence, Glesson C.J. thought that *Cook* should be departed from as the standard of care ought to be objective and impersonal, and not be modified by the personal attributes of the driver.[8] In coming to this conclusion, Glesson C.J. also stated that the fact the driver concerned was subject to a scheme of third party insurance was irrelevant towards determining the "common law principle" concerning the standard of care.[9] In doing so, he was perhaps subtly disagreeing with Kirby J. who, whilst prepared to depart from *Cook*, would only do so provided that regard was given to the "important practical feature of the universal existence of compulsory third party motor vehicle insurance".[10] For present purposes, the reasoning of Kirby J. based on insurance is not of significance, although that particular view would surely invite comment on other occasions. It is instead the joint judgment that assumes particular importance.

In the joint judgment, Gummow, Hayne and Kiefel JJ. first considered whether the four considerations laid out in *The Commonwealth v. Hospital Contribution Fund*[11] were fulfilled to enable a departure from *Cook*. These four considerations, a rule of Australian law but a manifestation of a broader principle of precedent, were summarised in *John v. Federal Commissioner of Taxation*[12] as being that (a) the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases; (b) there were differences in the reasoning that led to the earlier decisions; (c) the earlier decisions had achieved no useful result but considerable inconvenience; and (d) the earlier decisions had not been independently acted on in a manner which militated against reconsideration. In this respect, they concluded that whilst the basis of the plurality in *Cook* was based on the now discredited (in Australia, at least) notion of "proximity",[13] that was not a sufficient reason to depart from *Cook*. The key reason for departure was considering the plaintiff's knowledge of the defendant's personal attributes as being relevant to the determination of the standard of care would encounter both "doctrinal and practical" difficulties.[14] As to doctrine, it was said that the basic considerations of principle demand that the standard to be applied is objective and thus knowledge of inexperience can provide no sufficient foundation for applying different standards of care.[15] While it was recognised that the law applies different standards in some cases, those standards are applied uniformly, whereas the standard in *Cook* applied differently depending on whether the plaintiff was supervising the defendant. This distinction was said to be unwarranted and therefore *Cook* should not be followed. In an important part, the joint judgment stated:

> The common law recognises many circumstances in which the standard of care expected of a person takes account of some matter that warrants identifying a class of persons or activities as required to exercise a standard of care different from,

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[8] *Supra* note 1 at para. 10.

[9] *Ibid.* at paras. 21-23.

[10] *Ibid.* at paras. 110 and 143.

[11] (1982) 150 C.L.R. 49.

[12] (1989) 166 C.L.R. 417 at 438-439.

[13] In Singapore, the criterion of "proximity" has found renewed application after the Singapore Court of Appeal's decision in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency* [2007] 4 S.L.R. 100.

[14] *Supra* note 1 at para. 50.

[15] *Ibid.* at paras. 53-54.

or more particular than, that of some wholly general and "objective community ideal". Chief among those circumstances is the profession of particular skill. A higher standard of care is applied in those cases. That standard may be described by reference to those who pursue a certain kind of occupation, like that of medical practitioner, or it may be stated, as a higher level of skill, by reference to a more specific class of occupation such as that of the specialist medical practitioner. At the other end of the spectrum, the standard of care expected of children is attenuated.

But what distinguishes the principle established in *Cook v. Cook* from cases of the kind just mentioned is that *Cook v. Cook* requires the application of a different standard of care to the one defendant in respect of the one incident yielding the same kind of damage to two different persons, according to whether the plaintiff was supervising the defendant's driving or not. In all other cases in which a different level of care is demanded, the relevant standard of care is applied uniformly. No distinction is drawn according to whether the plaintiff was in a position to supervise, even instruct, the defendant although, of course, if the plaintiff was in that position, a failure to supervise or instruct may be of great importance in deciding whether the plaintiff was contributorily negligent.

There is no warrant for the distinction that was drawn in *Cook v. Cook*. *Cook v. Cook* should no longer be followed in this respect.[16]

Turning to practice, it was stated that it would be difficult to apply a variable standard as it is unclear what "inexperienced" really means.[17] Chiefly for these reasons, and notwithstanding that *Cook* has stood as authority for more than 20 years, *Cook* was departed from in so far as the care that the learner driver should take is that of the reasonable driver. Accordingly, it was found that the first respondent had breached his duty to the appellant, but the damages to the appellant were reduced to take account of his own contributory negligence. This brought Australian law in line with the English position as articulated in *Nettleship*.

B. *Singapore*

The approach in *Imbree* also brings the Australian approach in line with the Singapore approach. Singapore law adopts *Nettleship* and not *Cook*. Indeed, perhaps because of the heavier dependence on English precedents, *Cook* has never been cited in a Singapore decision. In its place, *Nettleship* has been cited a few times, but none as significant as in the Singapore High Court decision of *Ng Keng Yong v. Public Prosecutor*.[18] In that case, a Singaporean naval ship collided with a merchant ship, resulting in the death of four crewmembers on board the naval ship. The two appellants in *Ng Keng Yong* were charged (and convicted in the lower court) of causing deaths by negligently navigating the naval ship. Before the Singapore High Court, the second appellant argued, inter alia, that because she was a trainee officer, she

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[16] *Ibid.* at paras. 69-70.

[17] *Ibid.* at paras. 56-57 (footnotes omitted).

[18] *Ng Keng Yong v. Public Prosecutor* [2004] 4 S.L.R. 89 [*Ng Keng Yong*].

ought *not* to be held to the same standard as a reasonably competent and qualified officer. In rejecting this argument, Yong Pung How C.J. held that to take into account the second appellant's inexperience would be to render the determination of the appropriate standard too ambiguous and uncertain. The second appellant was therefore held to the standard expected of a reasonably competent and qualified officer. As a matter of policy, Yong C.J. regarded the outcome as sound: the second appellant had control over a vessel which was plying in open waters with merchant traffic and so she was responsible for the lives of her crew and the crews of other vessels in the vicinity.[19] Accordingly, at least in relation to her crew members who knew of her lack of qualification, the standard to which the second appellant was held was consistent with the approach taken in *Nettleship*. It did not matter that the second appellant was not qualified, or that her crew members *knew* about this; the standard to be applied was an objective one devoid of any reference to her personal characteristics. Yong C.J. stated that:

> At the end of the day, the duty of care should be tailored not to the actor, but rather to the act which he or she elects to perform: *per* Mustill LJ in *Wilsher v. Essex Area Health Authority* [1987] QB 730 at 750-751. Holding a trainee to the same standard as a qualified professional is also sound as a matter of policy....[20]

Thus, as the law currently stands, the approach is common in England, Australia and Singapore. However, certain difficulties remain and it is to them that this note now turns.

IV. A Common Problem in Singapore and Australia: "Departures" from the Objective Standard of Care

The first point of interest is the reasoning in *Imbree* that *Cook* represented an unwarranted departure from the objective standard of care. Whilst it is an oft-cited proposition that the standard of care ought to be an objective one in as much as it "eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question",[21] it is equally true that this impersonal standard takes account of the circumstances associated with the act. In this regard, the repeated claim in *Imbree* that *Cook* represented a "departure" from this objective standard begs the question: what is the content of this objective standard? To say that a standard is objective is one thing; to give it *content* is quite another. Objectivity in a vacuum is no standard at all. It would therefore be meaningless to speak of the objective standard without considering the circumstances in which the act concerned took place. Thus, if the act were the driving of a motor vehicle, the standard applicable would presumably be that of a reasonable driver, as *Imbree* has now held. However, within this categorisation of activity lies a fundamental presupposition: the law carves out broad categorisations of activities on the premise that these categorisations are "objectively" correct. Yet, in the example of the driver, why restrict the activity to "driving a motor vehicle" instead of extending it to "driving

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[19] *Ibid.* at 108-9.

[20] *Ibid.*

[21] *Glasgow Corporation v. Muir* [1943] A.C. 448 at 457.

a mechanical device capable of lateral movement" or restricting it otherwise? The underlying presupposition that these broad categories are objectively sound defeats the notion that "objectivity" is a universal, single concept; if it is universal, then there are many mini-universes, the domain of which can be subjectively defined. If this is correct, then categorisation itself (which determines the objective standard) is affected by *something*. In this respect, it is said that affection by "activity" is acceptable, whereas affection by the "actor" is not: herein lies the distinction that *Nettleship* and *Cook* are usually used to illustrate. However, this is a fine distinction and it is at least arguable that the prior categorisation of activity is largely a matter of semantics ultimately dependent on the characteristics of the actor. Thus, while the knowledge that a plaintiff has of the learner status of a defendant driver does not lower the standard of care, could it be said that the learner driver was not engaging in the *professional* driving of a motor vehicle but in the *amateurish* driving of the vehicle, reminiscent of *Wells v. Cooper*,[22] thereby "lowering" the standard in like effect? If categorisation were defined narrowly, then it answers the joint judgment's critique in *Imbree* that a standard defined by personal attributes does not apply uniformly. Uniformity being viewed from the point of categorisation, a narrow categorisation necessarily imputes uniformity, albeit a narrower one. Therefore, to reject *Cook* on the reasoning that to take into account the knowledge of inexperience is to offend the objective standard of care is to ignore that (a) objectivity itself is determined by the prior categorisation of activities and that (b) this prior categorisation is dependent on the personal attributes of the defendant in so far that, semantically at least, personal attributes can be expressed in the form of categorisation and the standard set accordingly. If *Cook* is to be overruled and *Nettleship* followed, it might be that this as a matter of policy affected by practical difficulties. Indeed, here, Kirby J's reasoning on the basis of insurance is of some attraction.

V. A Specific Problem in *Imbree*: Common Practice Established by *Cook* as Embodying Standard in Law

A second issue of interest arising specifically from *Imbree* is that whilst the High Court of Australia was clearly alive to the longevity of *Cook*, it did not quite consider the effect overruling *Cook* might have. One legal effect is that *Cook* established a legal standard by which the driver in *Imbree* understandably took to be correct. In choosing not to prospectively overrule *Cook* but to apply the new standard in *Imbree* itself, it is arguable that the High Court of Australia ignored the possible argument that conformity with common (and accepted) practice is evidence that the proper standard of care had been taken: *Brown v. Rolls-Royce Ltd.*[23] Whilst it is true that common practice might be disregarded as showing the proper legal standard, *Cook* had actually established the *legal* standard explicitly and assertively in Australian law prior to *Imbree*, and definitely during the time when the facts in *Imbree* occurred. As the joint judgment in *Imbree* acknowledged, but did not substantively deal with, *Cook* must have "affected the terms on which cases have been compromised and the apportionments of responsibility that have been made by courts and parties".[24]

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[22] [1958] 2 Q.B. 265.

[23] [1960] 1 W.L.R. 210.

[24] *Supra* note 1 at para. 72.

If the object of the objective standard of care is to enable the defendant to know the standard he has to meet and to ensure the plaintiff compensation commensurate with his expectations based on a reasonable standard, then in overruling *Cook* and applying the result ex post facto to the facts in *Imbree*, it could be said that the High Court of Australia preferred future legal coherence rather than present substantive justice. Perhaps this would have been a good case for prospective overruling instead. This problem does not afflict the Singapore position directly in so far as *Nettleship* is good law and so will not (it is assumed) require re-evaluation. But the caution might be a more general one and would apply whenever a local court chooses to veer away from an established legal standard of care.

VI. Conclusion

Imbree will undoubtedly assume its rightful status as a landmark decision in time to come. The outcome in the case—subject to concerns concerning common practice outlined above—is a defensible one. There is much to be said about the impracticality of an infinitely variable standard of care. But in preventing this scenario, the law has invariably drawn potentially arbitrary categorisations, the bases of which have hitherto not been fully explained. To maintain coherence in this area of negligence law, it might be best to acknowledge the implicit policy dimension of the ascertainment of the standard of care, rather than to explain it according to the blanket distinction between "activity" and "actor" as apparently demonstrated in *Nettleship* and *Cook* but which may now, for reasons apart from *Imbree*, require rectification in the textbooks. This would, of course, as the foregoing discussion shows, affect the position in Singapore as much as it would in Australia.